MOTION FILED
NOV 1 2002

(2)

No. 02-541

In the
Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CORRECTION CAPTAINS' ASSOCIATION OF THE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FRANKIE & GENTILE, P.C.
Attorneys for Amicus Curiae
Correction Captains' Association of the City of New York
1565 Franklin Avenue, Suite 105
Mineola, New York 11501
(516) 742-6590

JAMES G. FRANKIE,
of Counsel.

November 1, 2002

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioners have consented to the filing of this *Amicus Curiae* brief in support of the Petition. A copy of their consent letter dated September 19, 2002 has been forwarded with the brief. The consent of the Respondent was requested, but not granted.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
POINT I	
THE STRIP SEARCH OF NEW ADMISSION INMATES UPON THEIR ENTRY INTO THE CORRECTIONAL FACILITY IS NECESSARY TO MAINTAIN THE SAFETY AND SECURITY OF THE FACILITY AND IS CONSTITUTIONAL	3
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Cases:	
Bell v. Wolfish, 421 U.S. 546 (1979)	3, 7, 8
Block v. Rutherford, 468 U.S. 576 (1984)	6, 7
Dobrowolskyj v. Jefferson Co., 823 F.2d 955 (6th Cir. 1989)	6
Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir. 1990)	6
Logan v. Shealy, 660 F.3d 1007 (4th Cir. 1981)	6
Mary Beth G. v. City of Chicago, 723 F.2d 1262 (7th Cir. 1983)	6
Pell v. Procunier, 417 U.S. 817 (1974)	3
Price v. Johnson, 334 U.S. 266 (1948)	3
Turner v. Safley, 482 U.S. 78 (1987)	6
Walsh v. Franco, 849 F.2d 66 (2d Cir. 1988)	4, 5, 6, 7
Weber v. Dell, F. 2d 796 (2d Cir. 1986)	4, 5, 6, 7
Constitutional Provisions:	
U.S. Const., Amend. IV	8
Statutes:	
New York State Penal Law Section 70.15(1)	4n.2
New York State Penal Law Section 70.15(2)	4n.2
New York State Penal Law Section 70.15(3)	4n.2

INTERESTS OF *AMICUS CURIAE*

The Correction Captains' Association of the City of New York, hereinafter referred to as ("CCA") respectfully submits this brief in support of the Petition for Certiorari in this matter.[1]

The CCA is the certified collective bargaining unit for supervisors in the rank of Captain in the New York City Department of Correction. There are approximately nine hundred fifty (950) members in the CCA.

The New York City Department of Correction, hereinafter (DOC), provides for the care, custody and control of inmates housed in its facilities. The vast majority of these inmates are detainees awaiting disposition of criminal charges in the Courts of the five counties of New York City *i.e.*, Kings, Bronx, Richmond, New York and Queens. However, DOC also houses inmates sentenced to terms of incarceration of one year or less. Additionally, the DOC houses inmates pursuant to contract with the State of New York and houses inmates awaiting transport to other jurisdictions both State and Federal for resolution of their cases in those jurisdictions.

Correction Captains as first line supervisors are responsible for insuring the proper care, custody and control of all inmates housed in DOC facilities. In addition to insuring the safety of all inmates, Captains (CCA) are also responsible for the safety of visitors and staff. CCA members are sued and/or disciplined under a failure to supervise theory when inmates injure visitors, staff, each other or themselves.

Modification of the Department's policy to prohibit the strip search of new admissions charged with misdemeanors

---

[1] Pursuant to Rule 37.6 of this Court, the *amicus curiae* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

absent reasonable suspicion that the inmate is carrying contraband, (*e.g.*, weapons or drugs), inhibits the safe, prudent and effective administration of Department facilities and exposes inmates, visitors and staff to unnecessary, real and heightened dangers. Moreover, CCA members will be subject to discipline and potential civil liability. Often, said liability will be premised upon a failure to detect and/or prevent the possession of contraband by inmates.

Therefore, the CCA urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit which struck down the policy of the Nassau County Correctional Center which provided for routine strip searching of all new admission inmates as a violation of the Fourth Amendment unless the correctional center could articulate reasonable suspicion that the inmate was concealing contraband (*e.g.*, weapons or drugs).

SUMMARY OF THE ARGUMENT

The practice of strip searching new admission inmates, who have been remanded to the custody of the Department of Correction, serves a legitimate governmental security concern. The policy constitutes an effective and necessary method of detecting and deterring the introduction of contraband into correctional facilities. It is a reasonable and rational practice which is presented in a correctional setting and is constitutional under the circumstances.

Any requirement that reasonable suspicion be established before new admission inmates charged with non-felony offenses could be strip searched upon their remand to custody unnecessarily interferes in the proper and efficient operation of the correctional facility. Such a requirement undermines the safety and security of the facility and exposes staff, visitors and inmates to unjustifiable dangers. Moreover, any claimed justification for distinguishing between felony and non-felony new admissions inmates as it relates to their

strip search upon entry into the correctional facility is unsound and not warranted by the Constitution. Additionally, an attempt to distinguish between "prisons" and "jails", especially in an urban setting such as New York is artificial, untenable and fails to recognize the realities of an urban correctional setting.

Deference to the expertise of correctional authorities in providing for the safety and security of staff, visitors and inmates should be given. The policy of strip searching all new admissions inmates represents a legitimate penalogical interest and is Constitutionally sound.

ARGUMENT

POINT I

THE STRIP SEARCH OF NEW ADMISSION INMATES UPON THEIR ENTRY INTO THE CORRECTIONAL FACILITY IS NECESSARY TO MAINTAIN THE SAFETY AND SECURITY OF THE FACILITY AND IS CONSTITUTIONAL

Simply because prison inmates retain certain constitutional rights does not preclude these rights from being subject to reduction and diminution. Lawful incarceration brings limitations of rights and privileges justified under our penal system, *Bell v. Wolfish*, 421 U.S. 520, 546 (1979) *Price v. Johnson*, 334 U.S. 266, 285 (1948).

These constitutional limitations are justified by considerations and circumstances underlying the legitimate policies of the correctional facility. And, while Courts might disagree with certain aspects of the operation of the correctional facility, a Court should not substitute its judgment for that of the administration experts under whose care, custody and control these inmates have been lawfully committed, *Bell v. Wolfish, supra, Price v. Johnson, supra, Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Plaintiff herein was arrested by Nassau County Police and charged with Harassment in the first degree, a Class B misdemeanor.[2] The police had been called by plaintiff's wife to the couple's residence pursuant to a domestic violence call. Plaintiff was arrested and held overnight at Nassau County Police Headquarters. The following morning plaintiff was transported to the Nassau County Family Court where he was arraigned on the family offense petition filed by his wife and was remanded to the Nassau County Correctional Center (NCCC). Upon his arrival and admission to the NCCC, plaintiff was required to submit to a visual strip search which included the removal of all of his clothing, the looking into his ears, mouth, hair, his lifting of his arms, and genitalia as well as his bending over and spreading his buttocks to facilitate visual inspection of his rectum for contraband.

Plaintiff challenges the NCCC policy of visual strip search of all new admissions arguing that prisoners charged with non-felony offenses are immune from such searches upon their admission to the NCCC absent reasonable suspicion that they are secreting contraband in the form of weapons or drugs.

The United States District Court and the Court of Appeals, Second Circuit agreed with plaintiff relying on the holdings in *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986). The CCA respectfully submits that the Courts' reliance upon these cases in reaching the decision herein was misplaced.

Walsh and *Weber*, involved unfortunate facts and circumstances, but involve scenarios which have no application to

---

[2] New York State Penal Law Section 70.15(2) provides that the sentence for a Class B misdemeanor shall not exceed three months. The sentence for Class A misdemeanors shall not exceed one year. The sentence for unclassified misdemeanors shall be in accordance with the term fixed by that specific statute. See Penal Law Section 70.15(1) and Section 70.15(3).

the instant matter. In *Weber v. Dell, supra,* the defendant's son was the victim of a crime (criminal mischief damage to his automobile). Family and friends were gathered at the defendant's home for a party following a wedding reception. The police were called and requested to respond to the residence in order that a report could be filed. After a protracted period of time, the police had yet to appear at the defendant's residence. The defendant called again complaining about the lack of police response. In the conversation defendant was told that the police would only respond immediately if there was a shooting. Defendant responded that there was a shooting and demanded an immediate police response. The police responded and arrested defendant for calling in a false police report, *i.e.*, that there had been a shooting. Defendant was arrested, handcuffed and removed from her residence by police in the presence of the wedding guests. The defendant was taken to the County jail where she was strip searched and thereafter released to appear for arraignment at a later date.

In *Walsh v. Franco, supra,* the defendant was challenging the legality of several parking tickets he had received. Through a mailing and clerical error, the incorrect court date was mailed to the defendant. The defendant, through no fault on his part, did not appear in court to answer the parking tickets and a warrant was issued for his arrest. The defendant was arrested and strip searched upon his admission to the County jail. Defendant was forced to undergo the strip search admissions procedure even though bail had already been posted on his behalf. Upon completion of the admissions process defendant was released on the $100 station house bail that had already been posted.

Both *Weber* and *Walsh* involved arrestees held in pre-arraignment detention. There had been no judicial determination concerning the issue of probable cause. Moreover, the defendants in *Weber* and *Walsh* were released after the police

processing stage and directed to return to Court at a later date. By contrast, the plaintiff in the instant matter was arraigned in Court and was remanded to the custody of the Nassau County Sheriff's Department at the Nassau County Correctional Center. Unlike *Weber* and *Walsh* who were strip searched at the police processing stage; the strip search of Shain, the plaintiff herein, was conducted after his arraignment in Court, remand to the Nassau County Correctional Center and upon his admission to the general jail population. See, *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1448 (9th Cir., 1990); *Dobrowolskyj v. Jefferson Co.*, 823 F.2d 955, 958 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1262, 1272 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981).

The Court of Appeals declined to follow this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987) which deferred to the expertise of correctional authorities in the day to day management of correctional facilities. In declining to apply *Turner*, the Court of Appeals created an unworkable distinction between "jails" and "prisons". The realities of the urban correctional facility (jail) including but not limited to the volume, contractual agreements to house State sentenced prisoners and the detaining of prisoners for other State and Federal authorities renders such a distinction untenable.

This Court in *Block v. Rutherford*, 468 U.S. 576 (1984) noted that the failure of a defendant to obtain release on bail or personal recognizance was a significant factor bearing on security measures needed for the proper administration of a detention facility. When one considers the Court's recognition of the relative ease with which one can obtain release on bail or personal recognizance pending trial it is submitted that the failure of a defendant charged with a non-felony to obtain release should signal that there may have been factors considered by the arraignment court that

render this individual a greater security risk rather than a lesser one as argued by the plaintiff herein.

In addition to distinguishing the case at bar from the plaintiffs in ***Walsh*** and ***Weber*** due to their pre-arraignment detention status, it is respectfully submitted that the Court erred in not giving appropriate deference to correctional administrators in determining what is needed to maintain internal discipline and security.

This Court has upheld the strip search, including body cavity search of detainees after contact visits with visitors from outside the facility. This Court noted that "simply because prison inmates retain certain constitutional rights does not mean their rights are not subject to reduction and diminution. Lawful incarceration brings limitations of rights and privileges justified under our penal system" ***Bell v. Wolfish***, at 546. Additionally, a ban on contact visits was determined to be constitutionally permissible and deference to jail administrators was afforded in determining such a policy to be needed and justified. ***Block v. Rutherford***, ***supra***.

In the case at bar, there are legitimate concerns that a policy of permitting inmates charged with non-felony offenses to enter the prison population without being "visually strip searched" will lead to an increase in contraband in the form of weapons and illegal drugs being introduced into the facility and imperil the safety and security of the facility, staff, visitors and inmates.

A policy of strip searching all new admissions is not only an effective method of detecting and confiscating contraband; it is a deterrent. The fact that the number of inmates caught attempting to smuggle contraband into the facility has declined is a testament that a no exception policy concerning search of all new admissions is a strong deterrent.

The requirement that reasonable suspicion exist before new admission inmates charged with non-felony offenses

may be strip searched upon their entry into the prison population is not required by the Constitution.

The Fourth Amendment to the United States Constitution, guarantees the right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. This Court had held the blanket body cavity search of all inmates after contact with outside visitors to be a reasonable exercise of prison officials authority in determining how to provide the safety and security of their institutions, *Bell v. Wolfish, supra.*

Inmates held after arraignment in the New York City System and in Nassau County, the case at bar, are not segregated by offense charged when transported to the correctional facility. Those charged with felonies and those charged with lesser offenses are transported together. Concern that those charged with non-felony offenses who will not be subject to strip search as a matter of policy will be utilized to smuggle contraband for themselves and others is real. The existence of a "pecking order" among the inmate population is well established. Predatory inmates may coerce or threaten the weaker members of the inmate population who are charged with misdemeanors into serving as "mules" to smuggle contraband into a correctional facility. These inmates may do so for a myriad reason including that they are threatened, promised protection, promised payment of money or promised the posting of bail.

Finally, it merits noting that in New York City as well as in the case at bar (Nassau County), some inmates are held on misdemeanor charges only to have warrants and/or new arrests on more serious charges, felonies and violent felonies lodged after their admission to the facility for conduct that occurred prior thereto. The reality that these inmates will have entered as misdemeanor new admissions immune from the visual strip search policy is further evidence of the need that all new admissions be visually strip searched upon their entry into the correctional facility and that the distinction

between felony and non-felony inmates with respect to the strip search policy is not practical.

Accordingly, the decision of the Court below should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANKIE & GENTILE, P.C.
Attorneys for Amicus Curiae
Correction Captains' Association of the City of New York
1565 Franklin Avenue, Suite 105
Mineola, New York 11501
(516) 742-6590

JAMES G. FRANKIE,
of Counsel.